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APPENDIX A

United States Court of Appeals
FOR THE SIXTH CIRCUIT.

Nos. 05-6390, 05-6456

BANK OF NEW YORK, as former Trustee for National-Southwire Company Pension Plan, Plaintiff,
Southwire Company
Defendant-Appellee,

v.

John Stephen JANOWICK, Gary Erwin, and Merl Kannapel, on behalf of themselves and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542,
Defendants-Appellants,

Century Aluminum Company,
Defendant-Appellant.

ARGUED: Sept. 18, 2006.

DECIDED AND FILED: Nov. 22, 2006.

Before: BATCHELDER and MOORE, Circuit Judges; COHN, District Judge.

BATCHELDER, J. delivered a separate dissenting opinion.

OPINION

MOORE, Circuit Judge.

When an insurance company's reorganization yields a pot of money that no one expected or even envisioned, who receives the proceeds? In short, that is the issue this case requires the court to resolve.

Bank of New York ("BNY") filed this interpleader action to resolve conflicting claims to stock it received from Prudential Insurance Company of America's demutualization, i.e., its reorganization from a mutual insurance company to a stock company. BNY received the stock as successor-in-interest to the former trustee of the National-Southwire Aluminum Company ("NSA") Pension Plan ("NSA Plan" or "Plan"). The Plan terminated in 1986, and the trustee used the Plan's assets to purchase two group annuity contracts, which satisfied the Plan's ERISA obligations to the employees.

The claimants to the stock are a class of employees ("Employees") of the now-defunct NSA (represented by Defendants-Appellants Janowick, Erwin, and Kannapel), Defendant-Appellee Southwire Company ("Southwire") (the parent company of the former NSA), and Defendant-Appellant Century Aluminum Company ("Century") (the purchaser of the former NSA's assets). The district court addressed the claims in two phases, first concluding via summary judgment that Southwire's claims were superior to those of the Employees, and next concluding that Southwire's claims trumped Century's. The Employees and Century both appeal.

Regarding the Employees' appeal, we **REVERSE** the district court's grant of summary judgment to Southwire, as

we conclude that both Kentucky law and the nature of demutualization compel the conclusion that the Employees are entitled to the proceeds, and **REMAND** for further proceedings consistent with this opinion. As to Century's appeal, we **VACATE** the district court's judgment and **DISMISS** Century's appeal as moot, as we conclude that Century could not have purchased from Southwire that which Southwire never owned.

BACKGROUND

The Pension Plan

In 1970, NSA created the Plan as a defined-benefit pension plan for the Employees, who worked at an aluminum smelting plant NSA operated in Hawesville, Kentucky. Under a defined-benefit plan, "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n. 18, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977). Thus, NSA paid contributions to the Plan through a funding agent, and the Plan held in trust and managed these funds on behalf of the Employees.

The Plan became governed by ERISA upon ERISA's enactment in 1974. In December 1986, NSA terminated the Plan. At that time, Irving Trust Company ("Irving") was the designated Plan trustee. Consistent with ERISA's requirements, *see* 29 U.S.C. § 1341(b), Irving purchased two group annuity contracts (nos. GA-5542 and GA-5543) from the Prudential Insurance Company of America ("Prudential") for the benefit of the Employees. These annuity contracts constitute an "irrevocable commitment[on behalf of Prudential] to provide all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(i). *See also* 29 C.F.R. § § 4001.2, 4041.28(c)(1), 4041.28(d)(1).

After Irving bought the annuity contracts (which cost approximately $7 million) from Prudential, some funds remained in the trust. Consistent with ERISA, the governing documents of the NSA Plan provided that such surplus funds could revert to NSA once the trustee fully satisfied the plan's obligations to its beneficiaries. *See* 29 U.S.C. § 1344(d)(1); Joint Appendix ("J.A.") at 157-58 (NSA Plan § 9.2). NSA received approximately $11.5 million under this provision. After all of the Plan's assets were distributed, Irving's status as trustee terminated sometime in 1987. At that point, the Plan was defunct.

Subsequent Transactions

Starting in the early 1990s, NSA underwent a series of corporate transactions with other companies under the umbrella of NSA's parent corporation, Southwire. In August 2000, Century agreed to purchase from Southwire the Hawesville plant and assets associated with its business.

Prudential's Demutualization

At the time Irving purchased the annuity contracts, Prudential was organized as a mutual insurance company under the laws of New Jersey. "A mutual insurance company has no shareholders and is instead owned by its policyholders." James A. Smallenberger, *Restructuring Mutual Life Insurance Companies: A Practical Guide Through the Process*, 49 Drake L.Rev. 513, 516 (2001). Those who purchase policies from mutual insurance companies receive both membership interests (e.g., the right to elect directors and the right to receive a proportionate share of the company if it liquidates) and contract rights (i.e., the obligations of the insurance company under the policy). Id. at n. 4.

Prior to 1998, New Jersey did not allow insurance companies to organize as stock companies. J.A. at 476 (NJ Dep't of Banking & Ins. Order No. A01-153 § I.). New Jersey law changed in 1998, and in December 2000, Prudential's board of directors adopted a plan to demutualize, that is, to reorganize from a mutual insurance company to a stock company. The demutualization plan was approved by policyholders in July 2001, and within three months, the New Jersey Insurance Commissioner approved the plan. Id. Prudential's demutualization plan required the new company, Prudential Financial, Inc. ("PFI"), to issue stock to eligible policyholders as consideration for their membership interests in the old company.

In early 2002, PFI issued 35,119 shares of stock to BNY as the successor-in-interest to Irving. The stock was intended to compensate Irving for the loss of membership interests that it held as the contract-holder of the group annuities purchased to terminate the NSA plan. However, BNY denied both that it was the contract-holder and that it was entitled to the stock. Soon, BNY began receiving conflicting demands for the demutualization proceeds when Southwire, the Employees, and Century all asserted entitlement to the stock. To settle these claims, BNY filed its interpleader complaint on February 3, 2003, naming Southwire, the Employees, and Century all as defendants. The district court had jurisdiction under the minimal diversity requirement of the federal interpleader statute because two of the claimants are diverse, as the Employees are Kentucky residents and Southwire is organized as a Delaware corporation. 28 U.S.C. § 1335(a); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967).

Procedural History

The district court certified a defendant class consisting of the Employees and dismissed BNY from the case, leaving the three claimants as parties to the litigation. It also granted BNY permission to sell the stock and ordered it to deposit the proceeds with the court. Accordingly, BNY deposited approximately $1.3 million with the district court.

The district court proceeded in two phases to settle the claimants' dispute. First, it pitted Southwire against the Employees to determine which of those two parties had the better claim to the demutualization proceeds. On September 29, 2004, it granted summary judgment to Southwire and denied summary judgment to the Employees.

Next, the district court decided whether Century's claim to the proceeds was superior to Southwire's. On August 10, 2005, it granted summary judgment to Southwire and denied summary judgment to Century.

Both the Employees and Century appealed, and their appeals were consolidated for briefing and submission. We have jurisdiction over the Employees' and Century's appeals from the district court's final judgment under 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review de novo a district court's order granting summary judgment, *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir.2004), and will affirm a grant of summary judgment "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing the district

court's decision to grant summary judgment, we must view all evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

ANALYSIS

The Employees argue that Southwire never had a right to the demutualization proceeds, and Century argues that it purchased the right to the proceeds when it bought the Hawesville plant from Southwire in 2000. Because we conclude that the Employees are correct, Southwire never could have transferred the interest in the demutualization proceeds to Century.

Ultimately, we conclude that the Employees are entitled to the demutualization proceeds for three separate reasons. First, we conclude that the terms of the annuity contract compel the conclusion that the Employees are now the contract-holders, and thus entitled to the demutualization proceeds. Second, we conclude that under relevant contract principles, we would supply a term to the annuity contracts under Restatement (Second) of Contracts § 204 entitling the Employees to unforeseen demutualization proceeds. Finally, we consider the nature of demutualization and conclude that Southwire could not have had any claim to the demutualization proceeds because it never held any ownership interest in Prudential.

Terms of the Annuity Contract

Prudential's demutualization plan entitles "Eligible Policyholders"-i.e., the "owners" of eligible policies and annuity contracts, J.A. at 297 (Reorganization Plan § 1)-to demutualization compensation. J.A. at 318 (Reorganization Plan § 7.1(b)). For group annuity contracts, it defines the designated contract-holders as "owners." J.A. at 312

(Reorganization Plan § 5.3). Here, the annuity contracts designate Irving as the contract-holder "as trustee for [the] National-Southwire Aluminum Company Pension Plan." J.A. at 190, 235. Irving's successor (BNY) claims that Irving's status as contract-holder ceased, presumably when its status as trustee of the NSA Plan terminated in 1988. The demutualization plan does not indicate how shares should be distributed when a policy lacks an owner.[1]

Because the demutualization plan does not resolve the dispute, we turn elsewhere. The Department of Labor ("DOL") has concluded that, in disputes over demutualization proceeds born from an annuity contract purchased to terminate an ERISA plan,[2] the terms of the relevant annuity contracts and state law govern. Dep't of Labor, Office of Pension and Welfare Benefit Programs Op. No.2003-05A, 2003 WL 1901900 (Apr. 10, 2003). Although the DOL's advisory opinion is not binding on us, it is worthy of "some deference." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting *Reno v. Koray*, 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995)). Interpretive guidance from administrative agencies that is not the product of formal, notice-and-comment rulemaking is entitled to respect "to the extent that th[e] interpretations have the 'power to

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[1] Although no party so argues, the demutualization plan hints that Prudential should have resolved this dispute by invoking its "Resolution Procedures" once BNY disclaimed entitlement to the demutualization consideration. J.A. at 314 (Reorganization Plan § 5.9). The record contains no indication that Prudential did so.

[2] The "final distribution" of a terminating ERISA plan's assets occurs when the administrator "purchase[s] irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or ...otherwise fully provide[s] all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3); 29 C.F.R. § 4041.28(c). Annuities are an example of such "irrevocable commitments." *See* 29 C.F.R. § 4001.2.

persuade.'" Id. (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). The Fifth Circuit applied this standard and deferred to similar guidance from the DOL in *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 296 (5th Cir.2000). We conclude that the DOL guidance is persuasive because a membership interest in a mutual insurance company is a precondition to any right to demutualization proceeds, and the annuity contract creates such interests. Regardless of whether the annuity contract contemplates the right to demutualization proceeds, previous documents (e.g., the NSA Plan documents) could not have contemplated such a right, as they neither created nor encompassed membership interests in Prudential.

We conclude that the terms of the annuity contracts entitle the Employees to the demutualization proceeds. The parties do not press this argument in their briefs, but they have provided copies of the annuity contracts in the Joint Appendix. We address the parties' primary argument, whether we should apply Restatement (Second) of Contracts § 204 to supply a missing term to the annuity contracts, infra in Part III.B.

As noted above, Prudential's demutualization plan provides that contract-holders, as "owners" of the contracts, are to receive consideration in the form of stock. The annuity contracts dub Irving the contract-holder, but this provision is of no help because, as noted above, Irving's successor claims that it is no longer the contract-holder. The contracts further provide:

> The Contract-Holder at any time may, with the consent of the Prudential, appoint a successor Contract-Holder.... [H]owever, ... if the Contract-Holder notifies the Prudential

> that it will cease to exist or cease to perform the duties of the Contract-Holder hereunder and no successor Contract-Holder is appointed, this contract shall nevertheless remain in full force and effect ....

J.A. at 195 (Annuity Contract No. 5543 at § 1.10), 242 (Annuity Contract No. 5542 at § 3.7). The record contains no indication that Irving appointed a successor contract-holder or notified Prudential prior to 2002 that it would no longer perform the duties of contract-holder. Notably, the contracts are silent regarding who becomes the successor contract-holder in this situation.

"The primary object in construing a contract ... is to effectuate the intentions of the parties." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky.Ct.App.2002). Kentucky courts[3] have long held that in

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[3] The annuity contracts contain choice-of-law provisions selecting New York law. J.A. at 196 (Annuity Contract No. GA-5543 § 1.13), 243 (Annuity Contract No. GA-5542 § 3.11). Notwithstanding these provisions, we believe that, for the following reasons, Kentucky law governs interpretation of the annuity contracts. As explained above, federal jurisdiction arises under the federal interpleader statute's minimal diversity requirement. *See supra* Part I.C. Accordingly, we apply the choice-of-law provisions of the forum state-here, Kentucky. *Republican Nat'l Comm. v. Taylor*, 299 F.3d 887, 890 (D.C.Cir.2002). *See also Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 501 (6th Cir.2003) (forum state's choice-of-law provisions apply when federal district court has diversity jurisdiction under 28 U.S.C. § 1332). We have previously determined that under Kentucky law, § 187 of the Restatement (Second) of Conflict of Laws governs contractual choice-of-law provisions. *Wallace Hardware Co. v. Abrams*, 223 F.3d 382, 397 (6th Cir.2000). Section 187 applies the law of the chosen state unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."

so doing, it is proper to consider "the circumstances surrounding the parties, and the object" of the contract, in addition to the contract's language. *Owens v. Ga. Life Ins. Co.*, 165 Ky. 507, 177 S.W. 294, 298 (1915) (quoting *Mitchell v. S. Ry. Co.*, 124 Ky. 146, 74 S.W. 216, 217 (1903)). "Whe[n] a contract is ... silent on a vital matter," it is especially appropriate for courts to consider each of these factors, as well as "the subject matter of the contract." *Cantrell Supply*, 94 S.W.3d at 385.

Here, these factors strongly indicate that the parties to the annuity contracts intended for the Employees to step into Irving's shoes as the contract-holders after Irving withdrew. The purpose of the annuity contracts was to provide pension benefits to which the Employees were entitled under the defunct NSA Plan. Accordingly, the Employees are third-party creditor beneficiaries of the contracts. See *Presnell Const. Managers, Inc. v. EH Const., L.L. C.*, 134 S.W.3d 575, 579 n. 12 (Ky.2004) (quoting *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky.Ct.App.1985)). Other than Prudential, which is not a party to this case, only the Employees have a direct interest in the annuity contracts. By contrast, Southwire is neither a party to, nor a beneficiary of, the contracts. For these reasons, we conclude that the parties' intent in entering the contract was that the Employees

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Restatement (Second) of Conflict of Laws § 187(2)(a), *quoted in Wallace Hardware*, 223 F.3d at 393 n. 9. The present dispute does not involve any parties domiciled in New York, nor any business conducted in New York. Even the purchase of the annuity contracts, in which the trustee to the pension plan of a Delaware corporation purchased annuity contracts from a New Jersey-based insurer for the corporation's Kentucky employees, involves no substantial relationship to New York. The only basis for the parties' choice is that Irving, which is no longer the contract-holder, was based in New York. For these reasons, under § 187(2)(a), Kentucky law applies. Further, both parties' briefs apply Kentucky law, which indicates that the parties agree that Kentucky law should govern our interpretation of the annuity contracts.

would become the contract-holders if Irving were to step down.[4]

Restatement (Second) of Contracts

Aside from our analysis of the contract's existing terms, we conclude that the Employees are entitled to the demutualization proceeds under Restatement (Second) of Contracts § 204. The annuity contracts say nothing regarding demutualization, which is not surprising as demutualization was not legal in New Jersey (where Prudential was located) when Irving purchased the annuity contracts from Prudential on the Employees' behalf. Because the annuity contracts do not contain a term regarding entitlement to demutualization proceeds, the Employees urge the court to apply Restatement of Contracts (Second) § 204 to supply the annuity contracts with a missing term. Section 204 states: "When the parties to a ... contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

Southwire objects, claiming that Kentucky courts have not endorsed § 204. Although no reported case in Kentucky has applied this provision of the Restatement, the Kentucky Supreme Court has applied various other sections of the Restatement, which demonstrates that the Restatement is generally valid authority in Kentucky. *See, e.g., Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky.2005) (applying § 195(2)); *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 144 (Ky.1991) (§ 354); id. at 145 n. 2 (§ 350); *Stevens v. Stevens*, 798 S.W.2d 136, 139 (Ky.1990) (§ 305). Further,

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[4] If we were to analyze this issue as supplying a missing term rather than interpreting existing terms, we would reach the same conclusion, employing the same analysis under Restatement (Second) of Contracts § 204 as employed in Part III.B.

Kentucky courts have recognized the principle that "if a contract is silent on a certain point, the law will imply an obligation to carry out the purpose for which the contract was made"-exactly the substance of § 204. *Old Republic Ins. Co. v. Ashley*, 722 S.W.2d 55, 58 (Ky.Ct.App.1986) (citing Warfield Nat. Gas Co. v. Allen, 248 Ky. 646, 59 S.W.2d 534 (1933)). *Cf. Richardson v. Eastland, Inc.*, 660 S.W.2d 7, 8 (Ky.1983) ("Where the contract is silent we must interpret the intent of the parties.").[5] Sitting in diversity, our duty is to apply the law of the forum state as announced by its highest court. *West Bay Exploration Co. v. AIG Specialty Agencies of Tex., Inc.*, 915 F.2d 1030, 1034 (6th Cir.1990). Where the relevant state supreme court has not spoken on an issue, we apply the rule that we believe the state supreme court would apply if it were to decide the case. *Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir.2003). Under these circumstances, we believe the Kentucky Supreme Court would employ Restatement § 204. Accordingly, so do we.

Section 204's comment d instructs courts to apply "community standards of fairness" to determine a term that is reasonable in the circumstances. Here, it is clear that none of the parties expected to receive the demutualization proceeds, which will constitute a windfall to whoever receives them. It is also clear that NSA's decision to terminate the Plan in 1986 relieved it of any risk associated with the Plan-namely, the responsibility to provide whatever

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[5] Southwire argues that Kentucky courts are reluctant to add terms to contracts. The cases it cites, however, are readily distinguishable, as they concern courts refusing to alter the existing terms of the contracts in question. See, e.g., O.P. Link Handle Co. v. Wright, 429 S.W.2d 842, 847 (Ky.1968) (declining "to change the obligations of a contract"); State Farm Mut. Auto. Ins. Co. v. Hobbs, 268 S.W.2d 420, 422 (Ky.1954) (stating that the court cannot "make a contract for the parties or revise the agreement while professing to construe it" and refusing to alter the contract's express termination date).

level of funding is necessary to yield the fixed level of benefits promised. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (noting that under an ongoing defined benefit plan, "the employer typically bears the entire investment risk and-short of the consequences of plan termination-must cover any underfunding as the result of a shortfall that may occur from the plan's investments").[6]

At the same time, the termination of the NSA Plan shifted risk onto the Employees. On paper, at least, the Employees are entitled to exactly the same level of benefits under the annuity contracts as they were under the NSA Plan, but crucially, their benefits are no longer guaranteed. Under ERISA, ongoing pension plans are guaranteed by the Pension Benefit Guarantee Corporation (PBGC). *See* 29 C.F.R. § § 4022.1 et seq. Not so for the annuity contracts. If Prudential were to become insolvent and default on its obligations under the annuity contracts, the Employees would be unable to recover the full value of the benefits. Accordingly, the NSA Plan's termination-the very event that necessitated purchase of the annuity contracts-stuck the Employees with a new (and unbargained-for) risk. Applying community standards of fairness, the inserted term should not entitle a party absolved of risk, such as Southwire, to unforeseen demutualization proceeds in preference to the party burdened with additional risk. Accordingly, we supply

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[6] Contrary to the dissent's conclusion, *Jacobson* in no way forecloses the Employees' claim to the demutualization proceeds. The dissent apparently fails to appreciate the key distinction between the two cases: *Jacobson* involved an ongoing retirement plan, whereas the Plan at issue here has been defunct since 1987. Consequently, as explained in Part III.C., the funds at issue could not have belonged to the Plan, and thus could never have been "plan surplus." For this reason, *Jacobson* is not controlling.

a term to the annuity contracts entitling the Employees to the demutualization proceeds.[7]

The Nature of Demutualization

Finally, the nature of demutualization compels the conclusion that Southwire never could have had any right to the demutualization proceeds. As noted above, by definition demutualization "involves a conversion of the mutual policyholders' ownership interest in the old [mutual] company into ownership interest in the form of stock in the new [stock] company." *UNUM Corp. v. United States*, 130 F.3d 501, 502 (1st Cir.1997), *cert. denied*, 525 U.S. 810, 119 S.Ct. 42, 142 L.Ed.2d 32 (1998). Here, no ownership interests materialized until April 1988, when Irving purchased the annuity contracts for the Employees' benefit.[8] NSA did not purchase any annuities from Prudential, and was not the contract-holder. The same is true of Southwire, NSA's parent company. Accordingly Southwire did not hold, and could not have held, any membership interest in Prudential, and thus could not have held any claim to the demutualization proceeds.

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[7] Were we to attempt to discern the term to which the parties to the annuity contracts would have agreed (the less-favored mode of analysis under § 204's comment d), we would reach the same conclusion. As noted above, NSA's decision to terminate the Plan burdened the Employees with a risk for which they did not bargain. Accordingly, we conclude that under the "hypothetical model of bargaining" approach, Irving as the trustee would have demanded that any unanticipated proceeds from an unforeseen insurance company demutualization inure to the Employees to compensate them for this additional risk. Prudential would not have been in a position to favor either the Employees or Southwire, and would not have objected to this term.

[8] The signature pages reflect that the contracts were signed in April 1988, but were effective November 1, 1986.

Similarly, the ownership interests in Prudential never inured to the NSA Plan. The Plan's trustee (Irving) purchased group annuity contracts from Prudential to effectuate the "final distribution" of the Plan's assets under 29 U.S.C. § 1341(b)(3). This purchase represents the "closeout" of the Plan under 29 C.F.R. § 4041.28. Only then, after the NSA Plan terminated, did any entity (Irving) receive an ownership interest in Prudential. Thus, like Southwire, the NSA Plan could not have held a right to demutualization proceeds. Southwire apparently recognizes as much, as it states that the right to demutualization proceeds does not constitute a "plan asset[ ]." Southwire Br. at 26.[9] In sum, because neither Southwire nor the NSA Plan ever held an ownership interest in Prudential-a precondition for entitlement to demutualization proceeds-neither could have been entitled to the money at issue.

The court did not address the critical distinction between ongoing and defunct plans and did not provide any explanation of how demutualization proceeds can become an asset of a plan that is defunct and has no assets. Consequently, it appears doubtful that the case was correctly decided.

We reject the Northern District of Illinois's analysis, and instead follow the 2003 DOL opinion, which addresses

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[9] The Northern District of Illinois concluded in an unpublished opinion that the rights to an unforeseen demutualization may constitute "plan assets." *See Chicago Truck Drivers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters*, No. 02 C 3115, 2005 WL 525427 (N.D.Ill. March 4, 2005) (unpublished opinion). Although the case involved a pension plan that had terminated decades ago, the court based its conclusion on two interpretive letters from the Department of Labor that both addressed situations involving ongoing ERISA-covered plans. See U.S. Dep't of Labor, Employee Benefits Security Admin. Advisory Op.2001-02A (Feb. 15, 2001); U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations Advisory Op. 92-02A (Jan. 17, 1992).

how to treat demutualization proceeds purchased with the funds of a defunct pension plan. See Dep't of Labor, Office of Pension and Welfare Benefit Programs Op. No.2003-05A, 2003 WL 1901900 (Apr. 10, 2003).

Southwire disagrees, arguing that the right to demutualization proceeds reverted to NSA along with the $11.5 million in surplus trust funds. Flaws in this argument abound. First, Southwire overlooks that neither NSA nor the NSA Plan ever held any ownership interest in Prudential, as explained above.

Second, Southwire's argument tortures the language of the Plan documents, which provide that only "funds remaining after the satisfaction of all liabilities" revert to Southwire. J.A. at 463 (NSA Pension Plan ¶ 9.2). Southwire provides no reason for us to accept the counterintuitive proposition that an asserted right to proceeds from an unforeseen, and at the time unlawful, future demutualization of an insurance company was a fund remaining in the NSA Plan after Irving purchased the group annuity contracts.

Finally, Southwire's argument misdefines the right at issue. Southwire's position assumes the existence of some abstract right to demutualization proceeds, a right that apparently existed not only at a time predating the demutualization plan, but even when demutualization was not even legal and thus hardly foreseeable. This assumption is infinitely dubious, as the stack of documents regarding the Plan termination, purchase of annuity contracts, and reversion of remaining funds contains nary a word regarding such a right.

In reality, rights to proceeds from a demutualization arise only when a mutual insurance company demutualizes, and in such a situation, the mutual company's

demutualization plan defines those rights. With a proper understanding of the right at issue, it is apparent that no right to the Prudential demutualization proceeds could have arisen prior to December 2000, when Prudential announced its plan to demutualize. By that time, the NSA Plan-the only vessel through which Southwire could receive any right to demutualization proceeds-had been defunct for over a dozen years.

In short, Southwire's position is incompatible with the definition of demutualization. This problem does not, however, apply to the Employees' position, which is perfectly consistent with the understanding that no rights to demutualization proceeds arise until the demutualization is announced, absent a clear earlier agreement.

Century's Appeal

Century argues that it received the right to the demutualization proceeds from Southwire when it purchased from Southwire the Hawesville plant and associated assets in 2000. We have already concluded that Southwire never had any right to the demutualization proceeds. Accordingly, Century could never have received from Southwire any right to or interest in the funds here at issue, as they were not Southwire's to sell.

CONCLUSION

For all of the foregoing reasons, we **REVERSE** the district court's order granting summary judgment to Southwire and denying the Employees' motion for summary judgment, and **REMAND** this case for further proceedings consistent with this opinion. Additionally, we **VACATE** the district court's order granting judgment to Southwire and denying Century's motion for summary judgment, and **DISMISS** Century's appeal as moot.

MOORE, J., delivered the opinion of the court, in which COHN, D. J., joined.

ALICE M. BATCHELDER, Circuit Judge, dissenting.

I respectfully dissent, as I disagree with the reasoning and the outcome of the majority opinion. I believe this case is foreclosed by *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440-41, 119 S. Ct. 755, 142 L.Ed.2d 881 (1999) (holding that plan participants in a defined benefit pension plan have no claim to the plan's surplus assets). This case involves a defined benefit plan. There is no dispute that the annuities were properly calculated and funded to ensure that the employees will receive all of the benefits promised under the plan. The $1.3 million is surplus; it did not evolve over time into an additional defined benefit or become part of the annuity payments.

The majority provides multiple theories for gifting this money to the employees. None of these theories, however, changes the basic, irrefutable fact that these employees are only entitled to the benefits defined under the plan, and correspondingly, secured by the annuities. There is no evidence in the record and we have no basis to assume that these employees will not receive from Prudential all of the benefits to which they are entitled. I would affirm the decision of the district court and hold that this money represents surplus assets of a defined benefit plan, which was paid into the trust by the employer and must be returned to the employer as trust settlor.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-6390
No. 05-6456

BANK OF NEW YORK, AS FORMER TRUSTEE FOR NATIONAL – SOUTHWIRE COMPANY PENSION PLAN

Plaintiff,

v.

SOUTHWIRE COMPANY,

Defendant-Appellee (05-6390/6456)

v.

JOHN STEPHEN JANOWICK, ON BEHALF OF HIMSELF AND AS THE REPRESENTATIVES OF A CLASS OF CURRENT AND DEFERRED ANNUITANTS OF PRUDENTIAL GROUP ANNUITY CONTRACTS GA 5543 AND GA 5542, ET AL.,

Defendant-Appellants (05-6390),

CENTURY ALUMINUM COMPANY,

Defendant-Appellant (05-6456).

Before: BATCHELDER and MOORE, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

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* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX C

United States District Court
FOR THE WESTERN DISTRICT OF KENTUCKY

No. Civ.A. 4:03CV-20-M

BANK OF NEW YORK

Plaintiffs,

v.

JOHN STEPHEN JANOWICK, et al

Defendants.

DECIDED: Aug. 10, 2005.

Frank F. Chuppe, Wyatt, Tarrant & Combs, Louisville, KY, Julianne M. Plumb, Leo T. Crowley, Pillsbury Winthrop LLP, New York, NY, for Plaintiff.

Douglas L. Greenfield, Leon Dayan, Philip Hostak, Robert Alexander, Bredhoff & Kaiser, Washington, DC, Herbert L. Segal, Segal Stewart Cutler Lindsay Janes & Berry PLLC, Joseph Lee Hamilton, Stites & Harbison, Kurt A. Scharfenberger, Goldberg & Simpson, Lisa H. Thomas, Woodward, Hobson & Fulton, LLP, Mark S. Riddle,

Nicholas W. Ferrigno, Jr., Greenebaum Doll & McDonald, Ayna N. Roby, Frank P. Doheny, Jr., Stephanie Baker Wilcher, Dinsmore & Shohl LLP, Louisville, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

MCKINLEY, J.

***1** This matter is before the Court upon cross-motions for summary judgment filed by the Defendant Century Aluminum ("Century") [DN 56] and Crossclaim Plaintiff Southwire Company ("Southwire") [DN 57]. Having been fully briefed, the matter now stands ripe for decision.

For the reasons discussed below, Century's motion for summary judgment DENIED while Southwire's motion for summary judgment is GRANTED.

I. LEGAL STANDARD

The summary judgment standard requires that the Court find that the pleadings, together with the depositions. interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts of this case are largely undisputed, and as both parties have

moved for summary judgment, the Court reviews the uncontested facts.

II. BACKGROUND

A. Procedural Background

This is the second phase of a bifurcated interpleader determination filed by the Plaintiff, Bank of New York, to determine entitlement to the unanticipated proceeds of an insurance company's demutualization. The proceeds have been deposited with the Court. In the first part of the action, the Court determined entitlement between a class of former Southwire employees (the "Annuitants") and Southwire, holding that Southwire was entitled to the proceeds. In this phase of the action, the Court determines the entitlement to the funds as between Southwire and Century Aluminum, a purchaser of one of Southwire's subsidiaries.

B. Summary of Facts

In 1970, National Southwire Aluminum Company ("NSA"), a former subsidiary of Southwire, established a pension plan (the "Plan") for the benefit of its employees. The Plan provided a fixed amount of monthly income for its eligible employees, hence it is referred to as a defined-benefit plan. The Plan constituted a qualified retirement plan and trust subject to dictates of federal law, including the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2)(a). NSA entirely funded the Plan and provided periodic contributions to the Plan in amounts consistent with ERISA regulations. The funds NSA contributed were then held in trust by Irving Trust Company, now Bank of New York ("BNY"), for the benefit of the Plan's participants and/or beneficiaries. If there were insufficient assets to satisfy the obligation of the Plan, NSA was responsible for providing additional funds to meet the Plan's obligations.

In 1986, NSA terminated the Plan. According to federal law, the plan funds were used to purchase termination annuities from the Prudential Insurance Company of America ("Prudential"). The beneficiaries under the Plan became the Annuitants under two Group Annuity contracts. The contract-holder of the Group Annuity was the trustee of the Plan, Irving Trust Company. Thereafter, NSA was relieved of its obligation to pay benefits under the Plan. Eleven million dollars of surplus plan assets reverted to NSA pursuant to the terms of the Plan.

In 2001, Prudential, a New Jersey entity, converted its capital structure from that of a mutual insurance company to that of a stock company pursuant to New Jersey law. As part of the conversion, Prudential issued common stock to its policyholders. Consequently, Prudential issued shares of stock to the BNY, as successor of Irving Trust, because BNY

was the "contract-holder" of the two Group Annuity Contracts with Prudential. BNY informed Prudential that it neither had an interest in nor a right to the demutualization proceeds. In February, 2003, BNY filed this action because it received conflicting claims from the Annuitants, Southwire, and Century as to the ownership of the Prudential stock. BNY requested, and this Court permitted, BNY to liquidate the shares of stock and deposit the proceeds into its registry. BNY sold the shares, deposited the demutualization proceeds into the Court's registry, and was dismissed from this suit. In the first phase of this action, the Court determined that Southwire was entitled to receive the proceeds over the claims of the Annuitants based on principles of trust law and the language of the Plan. Now the Court must determine whether Southwire or Century is entitled to the proceeds.

As noted, NSA, a subsidiary of Southwire, established the plan in 1970. Between 1990 and 2001, NSA underwent several name changes and corporate restructures. In 2001, Southwire sold a subsidiary, Metalsco, to Century. It is because of the acquisition of Metalsco that Century claims the right to the demutualization proceeds. It is undisputed that these proceeds were entirely unanticipated and not specifically contemplated in Century and Southwire's negotiations.

III. DISCUSSION

Century contends that the demutualization proceeds constitute "assets" of Metalsco, a Southwire subsidiary, and were effectively acquired as a result of Century's acquisition of Metalsco. Southwire initially contends that under the principles of trust law, the proceeds revert to Southwire.[1]

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[1] Because the Court finds that Century did not acquire rights to the annuity contracts in conjunction with its acquisition of Metalsco, the Court does not address Southwire's argument regarding trust principles.

Alternatively, Southwire asserts that Century never acquired rights in the proceeds by the acquisition of Metalsco. Finally, Southwire asserts that by refusing all responsibility for the pre-existing pension plan, Century effectively relinquished any and all involvement right to the annuity contracts, including the unexpected proceeds that arose from them.

Century acquired Metalsco in April, 2001. Two relevant documents were negotiated between Southwire and Century: the Stock Purchase Agreement and the Redemption Agreement. The Stock Purchase Agreement provided that Century would purchase all of the outstanding stock of Metalsco, a wholly-owned subsidiary of Southwire, as well as certain "properties and assets necessary for the operation of the Business." The Stock Purchase Agreement specifically lists the acquisitions of Century, including the "direct or indirect beneficial ownership of all of the Assets." Section 3.13 of the Stock Purchase Agreement defines the "Assets" included in the sale:

> all of the assets, properties, including real and personal property, whether tangible or intangible, and the rights which are used or intended for use in or in connection with the Business ... and with respect to contract rights ... all contracts, agreements and other arrangements used or intended to be used in or relating to the conduct of the Business ... the Assets, include without limitation to following: (vii) all claims, causes of action, choses in action, rights of recovery and

> rights of setoff of any kind (including rights to insurance proceeds) ... pertaining to, or arising out of, the Business and inuring to the benefit of the Seller or any of its Affiliates ... (x) all of the Seller's and its Affliliates rights, title and interest in, to and under all other assets, rights and claims of every kind and nature used in the Business.

Section 3.13 limits the scope of "Assets" to properties and rights "used or intended to be used in or relating to the conduct of the Business." Section 1.1 of the Stock Purchase Agreement defines "Business" to mean "the business of converting alumina into primary aluminum at the Plant and the sale of such primary aluminum, as conducted by Southwire and its Affiliates."

Southwire suggests that its long terminated pension plan, and any rights thereunder, do not constitute "Assets" intended for use in the manufacture and sale of aluminum. The Court agrees. This interpretation is consistent given NSA/Southwires's continued responsibility toward the Plan and Century's express disclaimer of any such responsibility. Section 7.1(c) of the Stock Purchase Agreement states that all Hired Employees shall receive all benefits to which they were entitled under the pre-existing annuity contract and that the annuity contracts would not be the responsibility of Century. Clearly, if any liability had arisen with respect to the annuity contracts and the pre-existing pension plan, Southwire would have been responsible. Other sections of the Stock Purchase Agreement specify the parties' respective responsibilities, or lack thereof, toward employees. Section 11.2(a)(v) of the Stock Purchase Agreement further requires

Southwire to indemnify, defend and hold harmless Century for "any Liabilities, losses, damages, claims, costs and expenses, interest, awards, judgments and penalties ... arising out of or resulting from ... Liabilities relating to the Employees Benefit Plans maintained prior to the Closing Date by Seller...."

Century and Southwire further agreed that Southwire would redeem out of Metalsco prior to the closing certain properties and liabilities that Century did not want. To this end, the parties executed a "Redemption Agreement" prior to the closing, in which any "Unwanted Property" was redeemed out of Metalsco. "Unwanted Property" is defined in the Stock Purchase Agreement as:

> all Property owned or held at any time on or prior to the Closing Date by, and any Liabilities of, Metalsco, Skyliner, NSA or any subsidiary of any of them or any predecessor of any of the foregoing, other than (i) the Assets, (ii) the Liabilities of the Business reflected in the Closing Balance Sheet, and (iii) the Assumed Liabilities and any other Liabilities of the Business expressly assumed hereunder.

The Court further agrees with Southwire that to the extent there were any rights to the annuity contracts remaining in Metalsco, those rights were expressly redeemed out as Unwanted Property.

Century alternatively contends that if the demutualization proceeds were redeemed out, the right would have been reassigned to Century as a "Contract Right of the Business" by operation of Section 2.1 of the Stock Purchase Agreement. The Court rejects this contention as well. The contract rights relating to the business which were conveyed as "Additional Assets" included real property, intellectual property, power contracts, supply contracts and the like. At the time of the sale, the annuity contracts were not viewed as an asset. In truth, neither party foresaw any potential benefit arising from the annuity contracts, only liability. They were not a "right" that Century intended for use "in the business."

IV. CONCLUSION

The Court concludes that Southwire did not convey any rights as the sponsor of the pre-existing pension plan to Century. To the contrary, the purchase agreement makes it perfectly clear that Century rejected any and all responsibility toward the pre-existing plan. The annuity contracts were not assets which were to be used in the manufacture and sale of aluminum by Century at the Hawesville plant.

For the reasons set forth above, IT IS HEREBY ORDERED that the motion filed by Century Aluminum [DN 56] is denied and the Motion by Defendant and Crossclaim Plaintiff, Southwire Company, for summary judgment [DN 57] is granted.

APPENDIX D

United States District Court
FOR THE WESTERN DISTRICT OF KENTUCKY

No. Civ.A. 4:03CV-20-M

BANK OF NEW YORK

Plaintiffs,

v.

JOHN STEPHEN JANOWICK, et al

Defendants.

DECIDED: Aug. 10, 2005.

Frank F. Chuppe, Wyatt, Tarrant & Combs, Louisville, KY, Julianne M. Plumb, Leo T. Crowley, Pillsbury Winthrop LLP, New York, NY, for Plaintiff.

Douglas L. Greenfield, Leon Dayan, Philip Hostak, Robert Alexander, Bredhoff & Kaiser, Washington, DC, Herbert L. Segal, Segal Stewart Cutler Lindsay Janes & Berry PLLC, Joseph Lee Hamilton, Stites & Harbison, Kurt A. Scharfenberger, Goldberg & Simpson, Lisa H. Thomas, Woodward, Hobson & Fulton, LLP, Mark S. Riddle, Nicholas W. Ferrigno, Jr., Greenebaum Doll & McDonald, Ayna N. Roby, Frank P. Doheny, Jr., Stephanie Baker

Wilcher, Dinsmore & Shohl LLP, Louisville, KY, for Defendants.

MEMORANDUM AND OPINION

This matter is before the Court upon a Motion for Summary Judgment filed by the Defendant and Crossclaim Plaintiff, Southwire Company ("Southwire") [DN 38] and a Motion for Summary Judgment filed by Defendant Class Representatives John Stephen Janowick, Gary Erwin, and Merl Kannapel ("Annuitants") [DN 40]. Having been fully briefed, the matter now stands ripe for decision. For the reasons discussed below, Annuitants' Motion for Summary Judgment is **DENIED** while Southwire's Motion for Summary Judgment is **GRANTED**.

BACKGROUND

Southwire administered and maintained a pension plan ("the Plan") as part of the compensation it paid its employees from 1970 to 1986. The Plan provided a fixed amount of monthly income for its eligible employees, hence it is referred to as a defined-benefit plan. The Plan constituted a qualified retirement plan and trust subject to dictates of federal law, including the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2)(a). Southwire entirely funded the Plan and provided periodic contributions to the Plan in amounts consistent with ERISA regulations. The funds Southwire contributed were then held in trust by Irving Trust Company, now Bank of New York ("BNY" or "Plaintiff"), for the benefit of the Plan's participants and/or beneficiaries. If there were insufficient assets to satisfy the obligation of the Plan, Southwire was responsible for providing additional funds to meet the Plan's obligations.

In 1986, Southwire decided to voluntarily terminate the Plan. In accordance with federal law, the plan funds held in trust were used to purchase termination annuities from The Prudential Insurance Company of America ("Prudential") sufficient to satisfy all benefits and liabilities under the Plan. The termination annuities came in the form of two Group Annuity Contracts. The beneficiaries under the Plan became Annuitants under the two Group Annuity Contracts. Prudential issued certificates to the Annuitants stating that Irving Trust (BNY) was the contract-holder of the Group Annuity. Pursuant to ERISA, Southwire was relieved of its obligation to pay benefits under the Plan. In addition, after the obligation to the plan participants was fully satisfied and all administrative costs were paid, eleven million dollars ($11,000,000.00) remained. This money reverted to Southwire pursuant to the terms of the Plan.

Fifteen years later, in 2001, Prudential, a New Jersey entity, converted its capital structure from a mutual insurance company to a stock company pursuant to New Jersey law. As part of the conversion, Prudential issued common stock to its policyholders. Consequently, Prudential issued 35,119 shares of stock to the BNY, as successor of Irving Trust, because BNY was the "contract-holder" of the two Group Annuity Contracts purchased from Prudential.

BNY informed Prudential that it neither had an interest in nor a right to the demutualization proceeds. Subsequently, BNY learned that both the Annuitants and Southwire claimed an interest in the demutualization proceeds. Unfortunately, the Group Annuity Contracts did not specify who was entitled to these demutualization proceeds. In February, 2003, BNY filed this action because it received conflicting claims from the Annuitants and Southwire as to the ownership of the Prudential stock. The Court allowed BNY to liquidate the shares of stock and deposit the proceeds into its registry. BNY deposited

$1,357,703.69 into the Court's registry on November 11, 2003, and was dismissed from this suit. The Court must determine which party is entitled to these proceeds.

DISCUSSION

This is a case of first impression and there is precious little guidance for the Court. Southwire initially asserts that ERISA supports reversion of the demutualization proceeds to Southwire. Alternatively, Southwire argues that trust law entitles them to the proceeds. The Annuitants respond arguing that ERISA does not apply, the Plan has terminated, and that the only existing contract is the annuity contract itself which is silent as to who should be entitled to the proceeds. As such, the Annuitants urge the Court to supply a term pursuant to § 204 of the Restatement (Second) of Contracts in accordance with community standards of fairness and policy . Southwire characterizes the Annuitant's claim as a windfall, however, no analysis of this case can escape the fact that these proceeds will constitute a windfall for either party.

Southwire's argument that ERISA governs this situation is principally rejected because the Plan was terminated in 1986. On December 31, 1986, Southwire ceased maintaining the company pension plan, ceased benefit accruals, and terminated all obligations binding it under the Plan. After the Plan was terminated, ERISA no longer governed. The Department of Labor's Advisory Opinion 2003-05A (April 10, 2003) offers some assistance in this regard, however, it does not answer the ultimate question before the Court. In that opinion, the Department of Labor issued an advisory opinion addressing the same factual situation presented here–the proper disposition of

demutualization proceeds.[1] The Department of Labor advised that if the Plan was properly terminated under ERISA section 4044 and "all obligations and claims under the Plan were satisfied prior to the termination annuity contract provider's demutualization, there is no obligation under Title I of ERISA to treat demutualization proceeds as plan assets." Id. at 2. Thus, the Department of Labor reasoned that it would not be a violation of ERISA for the Group Annuity Contact Holder to take possession of the demutualization proceeds, and further stated that

> [t]he question of whether the employer or the beneficiaries of the termination annuity contract are the actual owners of the demutualization proceeds received by the employer as the named policyholder of the annuity is not within the jurisdiction of the Department of Labor under Title I of ERISA...[and is instead] governed by the terms of the contract and applicable state law.

Id.

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[1] The Employee Benefits Security Administration of the United States Department of Labor handles requests for interpretation and rulings of Title I of ERISA. Advisory opinions apply the law to a specific set of facts, issued in the form of information letters. ERISA advisory opinions have been interpreted by courts as persuasive, but not controlling authority. The limits of advisory opinions are discussed in *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 2181 (2001), and *Hospital Corp. of Am. & Subsidiaries v. C.I.R.*, 348 F.3d 136 (6th Cir. 2003).

Both parties use the Department of Labor Advisory Opinion to bolster their arguments. Southwire maintains that under New Jersey law, all "eligible policy holders" are entitled to demutualization proceeds in exchange for their ownership rights associated with their policies. N.J.S.A. 17:17-3(c). The definition of policyholder is "the contract-holder of any group annuity contract." N.J.S.A. 17B:18-13. This also applies to the policyholder of a group annuity contract. Id. at (d). Therefore, according to Southwire, the contract-holder of the Group Annuity Contracts, not the Annuitants, would be entitled to the demutualization proceeds. The Annuitants have responded, correctly, that the Group Annuity Contracts plainly state that Irving Trust (BNY) is the contract-holder. Furthermore, the Annuitants point out, Southwire has not complied with the explicit appointment clause of the Contracts, a clause which required that "with the consent of the Prudential, [the original Contract-Holder may] appoint a successor Contract-Holder." No notification or appointment of Southwire ever took place. Furthermore, even if Southwire were to establish itself as the contract-holder, as the Annuitant's brief successfully demonstrates, that status only entitles it to initial possession of the proceeds, not necessarily ownership thereof.

The Annuitants agree with the Department of Labor opinion that this issue should be decided by the terms of the contract and applicable state law. Since the Group Annuity Contract is silent as to this issue the Annuitants urge the Court to look to § 204 of the Restatement (Second) of Contracts. Under § 204 of the Restatement (Second) of Contracts (1981), the deciding Court may supply a term which is reasonable under the circumstances. The specific doctrine states:

> When the parties to a bargain sufficiently defined to be a contract have not agreed with

> respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Rest. 2d Contracts § 204 (1981).

The Restatement explains that such an omission can occur where, "[t]he parties to an agreement...entirely fail to foresee the situation which later arises and gives rise to that situation." *Id.*

The Kansas Supreme Court applied this doctrine in a similar case, *NEA-Coffeyville v. Unified School District No. 445*, 996 P.2d 821 (Kan. 2000). The question before the Kansas Supreme Court was who was entitled to surplus funds that originated from group health insurance policies that a school district had purchased for its employees. Like the case *sub judice*, the contracts governing the parties' relationship were silent on the issue of the possibility of excess funds or their potential ownership. The court stated that "the negotiated agreements entirely failed to foresee the possibility of the refund ... [and] [u]nder such circumstances, this court should supply a term which is reasonable in the circumstances." *Id.* at 831. The Court then determined, according to the "community standards of fairness and policy," that the teachers were more entitled to the funds. Id.

Employing an analysis similar to *NEA-Coffeyville*, the Annuitants claim that "co mmunity standards of fairness and policy" warrants this Court to award them the demutualization proceeds for two equitable reasons. First, "fairness" entitles the Annuitants to the proceeds because they now bear the risks associated with Plan, not Southwire. Southwire shifted the risk of the Plan from itself to the

Annuitants when it terminated the Plan and purchased the annuity contracts. Once Southwire terminated the Plan and federal law no longer required it to contribute funds to the Plan, the Annuitants had to rely on the financial stability of the insurance company, Prudential. Moreover, once Southwire terminated the Plan and it was removed from the auspices of federal law, the proceeds were no longer protected by the federal Pension Benefit Guaranty Corporation ("PCGB").

Second, the Annuitants state that they are entitled to the funds because of the nature of the relevant transactions. The argument is that if the Plan's administrators purchased individual annuity contracts for each Plan participant rather than a group contract, each Annuitant would have been a contract-holder and entitled to the proceeds. The Annuitants believe it is unfair to deny them their beneficial interest in Prudential merely because the Plan's Trustee took a convenient, and less expensive, way to structure the purchase of the termination annuities. Further, the Annuitants warn against establishing precedent that would encourage employers to choose riskier, lower-priced annuity options for their employees in hopes that a reversion of assets would eventually occur.

In determining what is reasonable under the circumstances the Restatement provides:

> Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention. Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised

> may be factors in determining what term is reasonable in the circumstances. But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy [.]

Rest. 2d Contracts § 204, cmt. d.

Kentucky has not officially adopted or rejected the Restatement, nor has it specifically referenced § 204.[2] In fact, as pointed out by Southwire, Kentucky courts have been rather consistent in declining to add terms to contracts which have not been bargained for between the parties. Also pointed out by Southwire, the two parties to the Group Annuity Contracts are Prudential and the Plan's trustee—not the Annuitants. Furthermore, the Court is not persuaded by the equitable arguments of Annuitants to such an extent that it deems it appropriate to engage in an analysis of "community standards of fairness and policy." Therefore, the Court rejects the Annuities proposal to utilize § 204 of the Restatement (Second) of Contracts. The Court believes that a more direct approach involving trust principles is the better approach to this issue.

While the Court agrees with the Department of Labor's analysis that ERISA does not apply to these facts,

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[2] Annuitants point out, however, that many jurisdictions, including the courts of New York and New Jersey have embraced § 204 of the Second Restatement. *See, e.g., In re Miller's Estate*, 447 A.2d 549, 554 (N.J. 1982); *Reiss v. Financial Performance Corp.*, 715 N.Y.S.2d 29 (App.Div., 1st Dept. 2000). Further, Kentucky courts have frequently looked to the Second Restatement for contract rules in other sections. *See e.g. General Motors Corp. v. Herald*, 833 S.W.2d 804 (Ky. 1992); *Stevens v. Stevens*, 798 S.W.2d 136 (Ky.1990).

that does not mean that ordinary trust principles should not be utilized. After all, even though ERISA governed this employee benefit plan, it was still only a trust that Southwire created for the benefit of its employees. Irving Trust Company was the Trustee and its powers and duties were set out in the trust documents. In order to terminate the trust properly under ERISA, the Trustee purchased termination annuities which served to fully satisfy Southwire's obligations to its employees. Irving Trust became the Contract-holder of the termination annuities only because it was the purchaser of the Group Annuity Contracts. Irving Trust was the purchaser only because it was the Trustee. Irving Trust had no role in this affair separate from its role as Trustee. Upon full satisfaction of these obligations and pursuant to the terms of the trust, $11 million of excess funds reverted to Southwire. Fifteen years later, when the demutualization proceeds came into the hands of The Bank of New York, successor to Irving Trust, as Contract-holder, the Trustee's obligations with respect to these funds was no different than if the funds been paid to the Trustee prior to termination. Prior to termination, these funds would be deemed ERISA plan assets and could only be used for the benefit of the employees, however, they would be paid over to Southwire upon termination if not needed to fully fund the termination annuities. The only significance of the fact that these funds came into the hand of the Trustee after the trust was terminated is that they are no longer technically ERISA plan assets. However, the fact remains that Southwire's obligation to its employees has been fully satisfied and these trust funds should be returned to the settlor of the trust pursuant to trust law and the terms of the document which created the trust.

CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that the motion filed by Defendant Class

Representatives John Stephen Janowick, Gary Erwin, and Merl Kannapel is **denied** and the Motion by Defendant and Crossclaim Plaintiff, Southwire Company, for summary judgment is **granted**.

/s/ Joseph H. McKinley, Jr.,
Judge

APPENDIX E

29 U.S.C. § 1002(35)

The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of the participants: (A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and (B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of the benefits under the plan.

29 U.S.C. § 1104(a)(1)

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under

the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1344(d)

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if--

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 1058 of this title occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of Title 26.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions

remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying--

(i) the market value of the total remaining assets, by

(ii) a fraction--

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date--

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of Title 26 (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990) or section

1104(d) of this title with respect to any distribution of residual assets of a single-employer plan to the employer.

APPENDIX F

Excerpt from Class Defendants' [*i.e.*, the Annuitants'] Memorandum in Opposition to Southwire's Motion for Summary Judgment, pp. 8-9, FN 4

The most straightforward reading of the record is that Irving Trust Company continued as the contract holder continuously, with a change in name to BNY, up to Prudential's distribution of demutualization proceeds and the filing of this lawsuit. We note that the only other conceivable conclusion one might draw from the record is that BNY *ceased to be the contract holder* after the Plan terminated and the Plan's trust was liquidated (because its status as contract holder in its capacity as trustee of the Plan ceased), and that *no successor contract holder was appointed*. *See* Exhibit 12. But that interpretation of the record would not aid Southwire, inasmuch as the Group Contracts contemplate the situation where there is no contract holder, providing that the contracts "remain in full force and effect" in the event that the contract holder "cease[s] to exist" or "cease[s] to perform the duties" of the contract holder. *See* Exhibit 4 at A4, Exhibit 5 at G3. And if the contracts continue in force with no contract holder, the only parties connected to the contract are Prudential and the third-party beneficiary Annuitants, who would then be entitled to the proceeds because they would be the only conceivable person left under the Group Contracts to which Prudential could pay the proceeds.

APPENDIX G

Section 9.2 of the National-Southwire Aluminum Company Pension Plan

The Plan may be terminated by NSA or by the Pension Benefit Guaranty Corporation.

Before NSA can terminate the Plan, it shall give the Pension Benefit Guaranty Corporation notice of the proposed termination at least 10 days before the effective date of the termination. The Pension Benefit Guaranty Corporation shall have 90 days (or such longer period as agreed to between NSA and the Pension Benefit Guaranty Corporation or as ordered by a court) in which to decide whether the assets of the plan are sufficient to discharge, when due, all obligations of the Plan with respect to basic benefits. During this time, the Administrator and the Funding Agent shall not pay out any amounts under the termination procedure unless a notice of sufficiency is received. If the Pension Benefit Guaranty Corporation finds the assets are sufficient and permits NSA to terminate the Plan, NSA shall direct the Administrator and the Funding Agent to allocate the Plan assets, after providing for expenses of adminstration, to the extent that such assets shall be sufficient, for the purpose of providing retirement income and other benefits accrued under the Plan to date of discontinuance of the Plan and which have not theretofore been purchased from an insurance company, for the benefit of Participants, retired Participants, vested terminated Participants, or other beneficiaries in accordance with ERISA § 4044. Any funds remaining after the satisfaction of all liabilities with respect to Participants, retired Participants, vested and terminated Participants, and beneficiaries under the Plan shall be returned to NSA.